United States
Court of Appeals
For the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Reply Brief for Petitioners

Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

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Petitioners come before this court seeking leave that additional evidence be adduced or that the final order of the National Labor Relations Board be reviewed and the same be set aside. The Order and Decision (R. 46) of the Board which this court should review and set aside concerns itself with (a) whether Andrews Illinois and Andrews Oregon are a single employer within the meaning of the Act, and (b) whether the Committee of Carterville busi-

nessmen were the agents of Andrews Illinois and as such committed an unfair labor practice.

In its brief the National Labor Relations Board sets forth in great detail the facts which lead up to the closing of the Carterville Plant of Andrews Illinois on June 1, 1954. A reading of respondent's brief and the record in this matter discloses that the Board is laboring under the same confusion that troubled the General Counsel in his brief before the Trial Examiner (R. 17).

There can be no doubt that the only reason Andrews Oregon was made a party to this matter by an amended complaint (R. 48) was to secure jurisdiction for the Board. There can be no doubt that the only reason that Andrews Oregon was held to be an employer within the meaning of the Act was that the Illinois corporation never reopened its doors, after they were closed on June 1. Having therefore chosen to ignore the realities of the situation, the Board, like the General Counsel, cannot help but continue to wallow in a morass of confusion.

To start out with, in its brief the Board has chosen to confuse Mr. A. M. Andrews, an individual, A. M. Andrews Company of Oregon, an Oregon corporation, and A. M. Andrews of Illinois, Inc., an Illinois corporation. These are three distinct and separate legal entities and careless language repeatedly used cannot make them one. Illustrative of this amor-

phous "Andrews" which is sometimes Mr. Andrews individually, sometimes one corporation and sometimes the other, is shown on page 3 of Respondents brief. The brief speaks of Mr. Andrews and Andrews Oregon and of the "eventual acquisition (of the Carterville plant) by Andrews (R. 3-5; 69-70)." The record on page 5 states "that the *Illinois corporation* entered into a purchase agreement" for the Carterville plant. (our emphasis)

In its brief before the Trial Examiner the General Counsel urged (R. 17) that "the Oregon corporation operated the Carterville plant as a branch establishment." Now the Board urges (RB. 12) "that the Illinois corporation was in reality merely an eastward extension of the Oregon operations".

Confusion of this type is implicit in the position of the Board.

ANDREWS OREGON AND ANDREWS ILLINOIS ARE NOT A SINGLE EMPLOYER

In its brief the Board argues (RB. 12) that Mr. Andrews controlled the Illinois corporation because he controlled Andrews Oregon. The record is barren of any evidence to support this assertion.

Mr. Andrews was the President of two corporations. He was elected to each office by two separate boards of directors. Those directors were in turn elected by two different sets of stockholders.

In his capacity as President of Andrews Illinois, Mr. Andrews ordered the shutdown of the Carterville plant. Was this act made possible by his relationship with the Oregon Corporation or by his supposed "ownership and control" of it? The answer is a clear and emphatic no. As president of Andrews Illinois, Mr. Andrews was answerable to its Board of Directors and stockholders and to them alone. The fact that Mr. Andrews was also president of Andrews Oregon has nothing to do with his order to close the Carterville plant.

Perhaps the fallacy of the Board's position that Mr. Andrews was able to order the shutdown of the Carterville plant because of his association with Andrews Oregon can best be shown by posing the question: If Andrews Oregon had never existed, would Mr. Andrews have been shorn of his power to order the closing of the Carterville plant? Once again, the answer is no.

THE COMMITTEE OF CARTERVILLE BUSINESSMEN

The Trial Examiner held that Andrews Illinois was liable for certain unfair labor practices committed by the Carterville businessmen. This holding was based upon a theory of agency. These Carterville businessmen were called to the Carterville plant by Mr. Tuttle, the Vice-President of Andrews Illinois, and a man who neither owned stock in nor held a

position with Andrews Oregon. Apparently the Trial Examiner used a theory of agency based upon apparent authority.

While that theory may well be sufficient to hold that Andrews Illinois was guilty of certain unfair labor practices, can it be extended in any way to Andrews Oregon? The answer, quite obviously, is no.

The Carterville businessmen had nothing to do with Andrews Oregon, or it with them. As to Andrews Illinois they were volunteers. As to Andrews Oregon they were strangers. It is this committee that undertook to speak and act for Andrews Illinois and in so doing committed the unfair labor practice. They did not and could not have spoken for or acted on behalf of Andrews Oregon.

It is this very separateness which the Board chose to ignore when it undertook to hold Andrews Oregon the employer of the employees of Andrews Illinois.

There is no evidence in the record, as a whole, which supports the Board's Decision and Order in holding Andrews Oregon responsible for the unfair labor practice which the Carterville businessmen committed.

RESPONDENT'S CASES ARE NOT CONTROLLING

Respondent seeks support in *NLRB v. National Shoes, Inc.*, 208 F. (2d) 688 (2 Cir., 1953). There the Board was seeking an enforcement order which required the respondents National Shoes, Inc., and National Syracuse Corporation to bargain collectively with the union. Here petitioners seek review of the decision and order of the Board which would require Andrews Oregon to make whole the employees of Andrews Illinois who were affected by the unfair labor practice of the Illinois corporation. This order would require Andrews Oregon to pay wages to individuals who were never on its payroll or never in its plant. This is a much different action than the one before the court in the National Shoes case.

There are other differences. National Shoes, Inc., was a distributor of shoes and had about 80 retail outlets in several states. National Syracuse Corporation, while an independent corporation, occupied the same position in the structure of National Shoes as did any one of its 80 outlets. It is to be noted on page 691 "National Syracuse purchased its merchandise from National Shoes, Inc." Respondent in its brief on page 14 states "The Oregon corporation paid for the machinery and raw material used in Illinois * * *" This is not correct. Andrews Oregon merely furnished credit for Andrews Illinois (R. 4) thus enabling the Illinois corporation to make the

necessary purchases from the various suppliers. There was no purchasing from the Oregon corporation of the materials which Andrews Illinois used.

In the National Shoe case, National Syracuse was merely one outlet, among many, and for the purposes of that case was treated as such. It was close to New York City and was part of a large scheme. Andrews Oregon and Andrews Illinois were two separate manufacturing companies, one in Portland, Oregon, the other in Carterville, Illinois. There was a separateness about the two corporations which respondent has chosen to ignore.

The case of *NLRB v. Stowe Spinning Co.*, 336 U. S. 226 (1949) is readily distinguishable. The question for decision was whether there was an unfair labor practice in denying a union organizer the right to use a company-owned meeting hall. The four companies which were held to be one, for the purposes of that case, were all in the town of North Belmont, North Caorlnia.

There was no attempt by the Board to have one company pay the wages of employees of another company. That case discloses that the schools, theater, and the building housing the post ffice were all controlled by the owners of the various mills. If the refusal to let a union organizer use the meeting hall inured to the benefit of one company, certainly it would inure to the benefit of all four of them. That case is of no value in the Board's attempting

to hold Andrews Oregon liable for the wages of the employees of Andrews Illinois.

NLRB v. Lund, 103 F. (2d) 816 (CCA 8th, 1939) is likewise easily distinguishable. In that case the Board was facing the problem of the proper unit for bargaining purposes, not the problem of whether one company should be forced to pay wages to employees of another corporation.

The Northland Ski Manufacturing Company plant was in St. Paul, Minnesota and the plant of C. A. Lund Company was in Hastings, 20 miles away. That the court was concerning itself with the appropriate unit is obvious. In that respect it said on page 818:

> "In other words, Lund would be in a position where he could force competition between the two groups of his employees to their detriment and his gain."

Even if we were to assume that Mr. Andrews were in a position to shift the business from one corporation to the other, as it might suit his fancy, and there is no evidence in the record to support this assumption, it is ridiculous to think that he could force competition between the employees of Andrews Oregon in Portland and those of Andrews Illinois in Carterville.

The nature of the case, the closeness of the two plants, the fact that each corporation sold the products of the other and all of the other different facts

which a reading of the Lund case discloses, make it so far removed from the question which is before this court, that it can have no weight.

NLRB v. Calcasien Paper Co., 203 F. (2d) 12 (5th Cir. 1953) is not in point. Again this case dealt with the appropriate unit. There the plants were 200 feet apart. The payroll of one company was prepared by the other company which also supplied all the raw materials, power and maintenance services.

The cases upon which the Board seeks to rely are not in point.

Respondent in its brief relies on *NLRB v. Stowe Spinning Co.*, supra, *NLRB v. National Shoes, Inc.*, supra, *NLRB v. Lund,* and *NLRB v. Calcasien Paper Co.*, supra.

The Stowe Spinning case is not concerned with a situation which even faintly resembles that which is now before the court. Its facts are entirely different.

Each of the other three cases deals with what is the proper unit for bargaining purposes. Those cases undertake to determine that separate corporations may be obligated to bargain with the union in question. There is a great difference between a holding that certain corporations may be joined together for bargaining purposes and a holding that one corporation must pay the employees of a wholly separate corporation because those employees have been in-

jured by an unfair labor practice with which the first corporation had nothing to do. Even if the cases which the respondent cites, more closely resembled the facts of the case now before this court, they would be of no value value because the remedy there sought is different from what the Board seeks here, namely, to make Andrews Oregon pay the wages of employees whom it never hired.

The case of *Mount Hope Finishing Co. v. NLRB,* 211 F. (2d) 365 (4 Cir., 1954) is controlling. Respondent seeks to distinguish this case by italicizing a sentence in the passage which we quoted on page 16 or our brief, to wit: "These of course are significant circumstances."

Respondent has made clear that which we were apparently unable to do. The ties between the two corporations in the Mount Hope case were considerable, and the circumstances there enumerated were significant but neither the ties nor the circumstances were enough to overcome the very separateness of the two corporations.

The same situation obtains here. There are ties between Andrews Oregon and Andrews Illinois. These ties or similarities are significant, but, as in the Mount Hope Finishing case, they are not sufficient enough to warrant the Board in holding Andrews Oregon and Andrews Illinois a single employer. Rather than saying that the circumstances are significant, the court might well have said, "In spite of

these circumstances there is not enough in the record to support the finding of the Board that the two Mount Hope corporations were a single employer." Likewise, in spite of certain common ties between Andrews Oregon and Andrews Illinois there is not enough in the record to support the finding of the Board that these two corporations, one an Oregon corporation doing business in Portland, Oregon, is an employer of the employees of the other, an Illinois corporation, which did business in Carterville, Illinois.

There is no evidence in the record to support the Decision and Order of the Board as the same applies to Andrews Oregon and therefore this court must review said Decision and Order and set the same aside.

Respectfully sumbitted,

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